IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 04.04.2007

Coram:-

The Hon'ble Mr. Justice P.SATHASIVAM
and
The Hon'ble Mr. Justice S.TAMILVANAN

Writ Petition No.47736 of 2006
and
M.P. Nos.1 to 3 of 2006 and 1 & 2 of 2007

Mrs.Meera R.Paul ... Petitioner

vs.

1. The Member Secretary,
The Chennai Metropolitan
Development Authority,
Thalamuthu Natarajan Maligai,
No.8, Gandhi Irwin Road,
Egmore, Chennai-600 008.

2. The Commissioner,
Corporation of Chennai,
Rippon Building,
Chennai-600 003.

3. Bagyam Narayanan

4. T.Narayanan

5. Vijay Srinivas

6. Kurshid Ahmad Khanday

7. Mushtaq Ahmad Banday

8. Mohamood Iqbal
R6 to R8 impleaded as per
order of court dated 8.1.07
in MP No.4/07 in WP.47736/06. ... Respondents

Petition under Article 226 of the Constitution of India for the issuance of a writ of mandamus as stated therein.

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Mr.T.V.Ramanujan, Senior Counsel for
Mr.T.V.Krishnamachari, for Petr.

Mr.J.Ravindran, for C.M.D.A./R1

Mr.G.T.Subramanian, for Corporation/R2

Mr.V.T.Gopalan, Senior Counsel for Mrs.Radha Gopalan for R-3 to R-5

Mr.P.R.Raman, for R-6 to R-8.

(Judgment of the Court, delivered by P.SATHASIVAM, J.)

Petitioner – Mrs.Meera R.Paul, has filed the above writ petition for the issuance of a writ of mandamus, directing respondents-1 and 2 to take appropriate action against the unauthorised construction put up by respondents-3 to 5 in the property bearing Old No.29, New No.55, T.T.K. Road, Alwarpet, Chennai-600 018, and stop further unauthorised construction and also take steps to remove the unauthorised construction by performing their statutory and public duty as per the provisions of the Tamil Nadu Town and Country Planning Act, 1971, the Development Control Rules and the Chennai City Municipal Corporation Act, 1919.

2. Case of the petitioner is briefly stated here-under:-

According to her, she was the absolute owner of the property bearing Old No.29, New No.55, TTK Road, Alwarpet, Chennai-18, comprised in O.S. No.2788, Block No.33, R.S. No.1594, sub-division No.14-A, Mylapore village. She entered into a development agreement with the third respondent and also executed a power of attorney dated 06.10.1995 in favour of the fourth respondent, who is none else than the husband of the third respondent. Both in the development agreement as well as the power of attorney, it was made clear that there should not be any deviation from the sanctioned plan while putting up construction. On 18.04.1999, she took possession of the 2nd and 3rd floors of the aforesaid property. Respondents-3 and 4 represented that there were some deviations and that they would get the same regularised as per law. Since her children are settled in America, she used to go to there very often. She returned to India in the month of October, 2006. On return, she found the open space in the ground floor encroached and an open urinal constructed un-authorisedly and high-handedly in gross violation of the Development Control Rules.

She objected to the unauthorised construction and sent a telegraphic notice through her counsel to respondents-1 and 2 and also to the Vigilance Cell of the CMDA. She also lodged a police complaint on 30.11.2006 with the Commissioner of Police, Chennai. The authorities have not taken any action to stop the unauthorised construction going on in the fourth floor. She cancelled the power of attorney dated 06.10.1995

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executed in favour of the 4th respondent. Respondents-3 and 4 have nothing to do with the property in question. They have no right to enter the property. 5th respondent is the son of respondents-3 and 4. He has also no legal right to put up any unauthorised construction without any sanctioned plan. The basement and the construction put up in the fourth floor are unauthorised. The barricade put up in the open space preventing common use by all the co-owners is also unauthorised. In such circumstances, having no other remedy, she has filed the present Writ Petition for appropriate direction.

3. Fifth respondent has filed a common counter affidavit for himself and on behalf of respondents-3 and 4. According to him, construction in the property in question including the basement, ground floor, 1st floor, 2nd floor, 3rd floor and 4th floor was completed in the beginning of the year 1998 itself. For the purpose of property tax assessment, the property in question has been subdivided as 29/1, 29/2, 29/3, 29/4, 29/5 & 29/6 relating to basement, ground floor, 1st floor, 2nd floor, 3rd floor and 4th floor respectively. The 4th floor, about which the petitioner has raised dispute, was constructed and completed sometime in the beginning of the year 1998 itself. The said 4th floor had been assessed to property tax from the first half of the assessment year 1998-99, ie., 1.4.1998 - 31.3.1999 and since then the property tax has been periodically and regularly paid. Similarly 4th floor has been assessed by the Chennai Metropolitan Water Supply and Sewerage Board (CMWSSB) from the first half of the year 1998-1999. The total extent of constructed terraced area in the 4th floor is 1600 sq. ft. excluding the common area. It was the writ petitioner, who, by virtue of 2 sale deeds dated 15.12.1997 and 09.12.1998, sold in favour of the 5th respondent the undivided portion of land of 458 sq. ft. Constructed portion of 1600 sq. ft. in the 4th floor had been leased out to the 6th respondent - Kurshid of Cottage Arts Emporium, who are the owners of basement, ground floor and 1st floors, by lease agreement dated 12.02.1999. The lease amount paid by Khurshid to the 5th respondent has been duly shown in the Income-tax account of Khurshid and also by the 5th respondent in his Income tax return including the TDS payments since 1998.

The petitioner was conscious and aware of the constructed 4th floor being in existence even before she occupied the 2nd floor and 3rd floor. The construction of 4th floor was completed well before 28.2.1999. He applied for regularisation of basement, ground floor, 1st floor and 4th floor bearing Corporation Sub Division No.29/6 by remitting a sum of Rs.6,50,000/- on 31.10.2000 and as such he is entitled to have his application for regularisation considered and granted since the same was completed well before 28.02.1999, which is the cut off date for one-time exemption.

4. The petitioner has filed a reply affidavit, reiterating her earlier stand and denying various averments made in the counter affidavit of the 5th respondent.

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5. On behalf of the CMDA/first respondent, Senior Planner, has filed counter affidavit, wherein, it is stated that the petitioner had obtained planning permission for the construction of ground plus three floors. The ground floor (Part) is approved for Departmental Store and another part for parking, watchman room and toilet. The 1st, 2nd and 3rd floors were approved for the use of residential purpose. The site was inspected on 09.06.1998 and it was noticed that the construction was in deviation to the approved plan. Hence, demolition notice was issued on 14.08.1998 for the deviation mentioned therein and a show cause notice for forfeiture of security deposit was also issued on the same day. Another demolition notice was issued on 14.07.2004 and an Occupier Notice was served on 11.02.2000. In response to the Occupier Notice, Khurshid Ahmad Khanday replied in his letter dated 24.02.2000 that he had applied under the Regularisation Scheme in the year 1999. The 5th respondent also applied for regularisation on 31.10.2000 and both the regularisation applications were returned 'unapproved'.

6. Second respondent - the Commissioner, Corporation of Chennai, has filed a counter affidavit stating that the 4th floor is not a new construction as it was constructed during 1998 itself, that the building was assessed and that the owner of 4th floor is paying the property and Metro water tax since 1998. The owner has applied to CMDA for regularisation of basement, ground, I and IV floors at 29/6, TTK Road, Chennai. Now, it is found that the owner is doing some repair works with GI Sheet roofing at 3 places for which notice is served as per MCMC Act.

7. In the light of the above pleadings, we heard Mr.T.V.Ramanujan, learned Senior Counsel for the petitioner; Mr.J.Ravindran, learned counsel for the first respondent/CMDA; Mr.G.T.Subramanian, learned counsel for the 2nd respondent – Corporation; Mr.V.T.Gopalan, learned Senior Counsel for respondents-3 to 5 and Mr.P.R.Raman, learned counsel for Respondents-6 to 8.

8. Mr.T.V.Ramanujan, learned Senior Counsel for the petitioner, after taking us through the Memorandum of Agreement, dated 21.08.1997, between the petitioner and the third respondent and all other connected documents/correspondence between the parties as well as the official respondents, submitted that direction may be issued to official respondents-1 and 2 to take appropriate and emergent steps to demolish the unauthorised construction in the 4th floor, which was constructed without intimating the petitioner, who is a co-owner from whom the third respondent secured the property for development, and obtaining her consent. According to him, respondents-3 to 5 have no legal right or locus standi whatsoever to apply for regularisation of the 4th floor without getting consent/permission from the petitioner in that regard. He further submitted that the authorities viz., R-1 & R-2 / Monitoring Committee, have no power to regularise the additional construction inasmuch as the same was put up after the cut off date, viz., 28.02.1999, prescribed by the Division Bench in Consumer Action Group vs. The State

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of Tamil Nadu & others (2006 (4) Law Weekly page-1) and F.S.I. is not available for the construction and also in view of the illegal action on the part of respondents-3 to 5 in utilising the entire common space for themselves and respondents-6 to 8, which is against the provisions of the Tamil Nadu Apartment Ownership Act, 1994. Learned Senior Counsel further submitted that proper direction may be issued to other respondents to keep the common area available in the ground floor free of obstruction for her use and use of all the occupants, to remove all other unauthorised structures like urinals, barricades, garden and generator room and also to ensure availability of a car parking area exclusively for the petitioner.

9. On the other hand, Mr.V.T.Gopalan, learned Senior Counsel for respondents-3 to 5, by placing relevant materials, submitted that the 4th floor was constructed well prior to the cut off date. According to him, inasmuch as the the construction in question was assessed to property tax, water tax etc., and leased out even in 1999, and also in view of the memorandum of agreement between the petitioner and the 3rd respondent, dated 21.08.1997, the present objection of the petitioner is liable to be rejected. He further submitted that, in view of the conduct of the petitioner, consenting for the construction of fourth floor and allowing to use the common space by the developer/3rd respondent, she is estopped from raising the objections at this juncture. He specifically submitted that, in view of the fact that the 4th floor was constructed well before the cut off date, respondents-3 to 5 may be permitted to work out their remedy before the Monitoring Committee constituted by the Division Bench in Consumer Action Group's case (cited supra).

10. Mr.P.R.Raman, appearing for R-6 to R-8, by pointing out various clauses in the Memorandum of Agreement dated 04.07.1997 between the 3rd respondent and respondents-6 to 8, and another agreement dated 21.08.1997 between the petitioner and the 3rd respondent, would contend that the petitioner is not entitled to raise the present objections.

11. We have perused all relevant materials and carefully considered the rival contentions of the respective counsels.

12. Though the petitioner has not specifically referred to the agreement dated 11.07.1996 entered into between herself and the third respondent, the same is available in the typed set of papers, which makes it clear that the third respondent, being a developer, shall build and deliver two residential units (one in the 2nd floor and one in the 3rd floor) of a total area of 4600 sq. Ft (including common areas). No doubt, the agreement stipulates that the developer has to carry out the construction of the proposed building in accordance with the plans as approved by the M.M.D.A and Corporation of Madras without any deviations. It is also not in dispute that the petitioner occupied the 2nd and 3rd floors as agreed, however, the grievance of the petitioner is that the basement and construction in the 4th floor are unauthorised. It is her further grievance that the construction of open urinal and the barricades

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put up in the open space preventing common use by all the co-owners are also unauthorised.

13. First, let us consider the objection relating to fourth floor. It is the grievance of the petitioner that, even in the agreement, her intention to use the upstairs exclusively by herself was made clear in express terms; that being so, the construction in 4th floor would very much affect her interests. On the other hand, it is the claim of respondents-3 to 5 that only with the consent of the petitioner, fourth floor was constructed before 28.02.1999. Two vital aspects/questions revolving around this issue are,

> (a) Whether there was consent either express or implied by the petitioner for any additional construction by the developer and is there genuineness in the assertion of the petitioner that the fourth floor was constructed only subsequent to the cut off date so as to hold against respondents-3 to 8, R-5 in particular?; and
>
> (b) whether R-5 is entitled to apply for regularisation of the unauthorised construction in the fourth floor in the background of his emphatic claim that the construction was well before the cut off date so as to avail the concession extended in the Division Bench decision cited supra?

14. Even at the first instance, we make it clear that we are not undertaking the exercise of deeply going into the factual details keeping in view the limited scope of consideration in this type of matters in writ jurisdiction except to assess, prima facie, in whose favour the balance of convenience lies.

14-A. The Memo of Agreement, dated 21.08.1997, between the petitioner and the third respondent disproves the claim of the petitioner that the fourth floor was constructed without her consent. In order to show that the 4th floor was constructed before the cut off date, viz., 28.02.1999, Mr.V.T.Gopalan, learned Senior Counsel, brought to our notice several documents. It is seen that, after construction of the 4th floor in 1998 itself, the 5th respondent made an application for separate assessment/sub division. The document/receipt issued by the Assistant Revenue Officer, Zone No.7, Corporation of Madras, which is available at page No.21 of the Additional typed set of papers filed by the counsel for respondents 3 to 5, clearly shows that it is a property tax receipt, mentioning the address as Old No.29/6 (relating to 4th floor), New No.55/6, TTK Road, Chennai-18. Tax was assessed and paid for 1/98-99. The next document is a Defaulters Notice, dated 27.11.1999, issued by the Corporation to the 5th respondent, which is available at page No.23 of the same typed set of papers, referring Apartment No.29/6 - 4th Floor. Letter of completion dated 01.06.1998, issued by the third respondent to respondents-6 to 8,

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available at page 29 of the typed set of papers filed by the counsel for respondents-6 to 8, shows that basement, ground and first floors were completed on 01.06.1998. Telephone Bills dated 11.08.1998; Corporation Tax receipts dated 14.10.1998 issued in favour respondents-6 to 8; rental agreement dated 12.02.1999 between the 5th respondent and respondents 6 to 8; CMDA receipt issued in favour of R-6 to R-8 and receipts issued by CMWSSB dated 16.09.1999, which are available in the typed set of papers, would go to show that the building including 4th floor was constructed prior to the cut off date.

The lease amount paid by Khurshid to the 5th respondent has been shown in the Income Tax account of Kurshid and also in the Income Tax returns of the 5th respondent including TDS payments since 1998. We have already referred to the fact that the 4th floor had been assessed to property tax from the first half of the assessment year 1998-99 ie., 01.04.1998 – 31.3.1999 and, according to respondents-3 to 5, since then property tax is being paid periodically and regularly. Apart from the above documents, Mr.V.T.Gopalan, learned Senior Counsel has brought to our notice letter No.ESI/11447/96, dated 14.08.1998, of the Member-Secretary, CMDA, addressed to petitioner Meera R.Paul. The said communication makes it clear that construction of basement, ground and 4th floor was completed way back in 1998. As a matter of fact, while pointing out the deviations to the approved plan, the said authority mentioned 'basement floor and IV floor is unauthorised additions' and directed the petitioner to secure compliance with the sanctioned plan within 30 days from the date of service of the notice, failing which, action would be taken under Section 56, sub Section (5) Clause (b)(i) and (ii) of the Tamil Nadu Town and Country Planning Act, 1971 without any further notice. The aforesaid documents amongst the parties including the petitioner and also the official documents of the CMDA, Corporation, CMWSSB etc. show that the 4th floor about which the petitioner has now raised a dispute was constructed and completed in the year 1998 itself.

15. Of the documents relied on by Mr.V.T.Gopalan, property tax receipt dated 18.06.1998, Defaulters notice dated 27.11.1999 and the letter of the Member Secretary dated 14.08.1998 addressed to the petitioner self-speak that the construction in the fourth floor had been completed in the year 1998 well before the cut off date. Admittedly, the petitioner took possession of 2nd and 3rd floors on 18.4.1999 without any protest for the construction in the 4th floor. Inasmuch as the petitioner has jumped into action only in the year 2006 keeping quite all these years, it only gives rise to a strong presumption of implied consent by the petitioner that she had no objection to the construction of the fourth floor particularly in the light of the following clause in the Memorandum of Agreement dated 21.08.1997 between the petitioner and the third respondent,

" .....

WHEREAS pursuant to the agreement entered into between the party of the First Part and the Confirming Party with the Builder, it has been agreed that the

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> Builder is entitled to construct, the entire Building in Schedule "A' land as the Builder may deem fit and according to her discretion; "

It is not as if that all of a sudden or in a wink of the eye, the construction has been completed. Even if the petitioner feigns ignorance, fact remains, without using the third floor of the petitioner, the construction activities could not have been pursued, and even while occupying the 3rd floor, she might have noticed the construction; hence, it is too late in the day to contend that things were done behind her back and without her knowledge. If the petitioner had been really aggrieved of the said construction, she should have approached the authorities or this Court at the inception itself, ie., in April, 1999, so that the scales might have tilted in favour of the petitioner. Therefore, prima facie, we see no justification in the claim of the petitioner that she was not at all apprised of the construction in the fourth floor and that the construction was after the cut off date. One other aspect staring at the claim of the petitioner is the statement of the Commissioner, Corporation of Chennai, made in his counter affidavit, which reads as follows,

> " 4. .... the petitioner referred 4th floor is not a new construction it is found that the building was constructed during 1998 and the building was assessed and the owner of the 4th floor is paying the property and Metro Water tax since 1998. It is also found that the owner has applied to CMDA for regularization of the Basement, ground I & IV Floor at 29/6, T.T.K. Road, Chennai. ....."

In view of the fact that the construction was put up before the cut off date with the implied consent of the petitioner, she cannot either claim that the developer should not be permitted to go before the Monitoring Committee or contend that the Committee has no power to consider the application of the developer for regularisation. Though Mr.T.V.Ramanujan, learned Senior counsel argued that the entire 4th floor was not constructed in the year 1998, as pointed out earlier, we are of the view that the said factual aspects cannot be gone into in these proceedings and our prima facie conclusion supports the stand taken by respondents-3 to 8. Hence, at this juncture, the petitioner cannot have any grievance as against the said construction put up by the 5th respondent.

16. Mr.T.V.Ramanujan, learned Senior Counsel, next contended that the petitioner being a co-owner, without her consent, respondents-3 to 5 can not be permitted to make any application to the authorities including one for regularisation. In view of Rule 3 (2) (j) of the Application, Assessment and Collection of Regularisation Fee (Chennai Metropolitan Area) Rules, 1999, respondents-3 to 5, particularly the 5th respondent is authorised to make such application before competent authorities. In fact, the public notice issued by the CMDA, pursuant to the judgment of the Division Bench decision referred supra, enables respondents-3 to 5 or 5th respondent himself or even the petitioner herself to apply before the Monitoring Committee for regularisation if the construction was made prior

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to 28.02.1999. In view of the same, the contention of the learned Senior Counsel for the petitioner is liable to be rejected.

17. Coming to the common area, particularly for car parking, Mr.T.V.Ramanujan, learned Senior Counsel, by taking us through various provisions of the Tamil Nadu Apartment Ownership Act, 1994 and the Rules made thereunder as well as the memorandum of agreement between the petitioner and the 3rd respondent dated 21.08.1997, submitted that those clauses, authorising the builder or one particular party to use the common space exclusively, are void. It is seen that the said agreement, to which the petitioner is a party, specifically refers to the car parking area. The agreement makes it clear that the party of the first part viz., Meera R.Paul, petitioner herein, shall be entitled to park her Motor Vehicles and utilise the car park space exclusively for her own use and for the use of her visitors and other occupants in the area coloured yellow in the plan appended to the agreement and which is situated on the eastern side of the building constructed in the schedule 'A' property. The next clause is to the effect that the builder, who is entitled to construct the entire building in the schedule 'A' land, shall be entitled to exclusively use the car park area coloured red in the plan and situated on the northern, southern and western sides of the building constructed in Schedule 'A' property. Clause 3 of the said agreement provides that the builder is entitled to assign and transfer such exclusive car parking area with conditions that the builder may stipulate therein to any third party/nominee exclusively to be used as exclusive car park area. The petitioner, who is a retired Vice-Principal of a College and her husband, a Professor, being parties to the said agreement, cannot plead either ignorance and take a different stand in deviation to the specific clauses in the said agreement. It is made clear that we are not giving any specific finding with reference to the provisions of the Tamil Nadu Apartment Ownership Act, 1994 and the Rules made thereunder. The conclusion of us is only for the disposal of the above writ petition. It is made clear that the writ petitioner is only entitled to the area on the eastern side of the building for her own use and for the use of her visitors for car parking. We also make it clear that the petitioner, being owner of the 2nd and 3rd floors, cannot be prevented from using the common space.

18. Coming to the specific grievance of the petitioner regarding construction of urinals, it is seen from the letter addressed by Khurshid to the Assistant Engineer, Corporation of Chennai, that the two urinals in the open space area of the building had been removed; hence, there is no need to issue any direction in that regard.

19. Finally, it is useful to advert to the observation made in the Division Bench decision referred to in this matter, which is very much relevant,

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" 29. ..... We hasten to add that the extension of date for making applications for regularisation, as well as the reduction in fees cannot be said to be illegal and the construction made prior to 28.2.1999 may be regularised, provided the application for regularisation has been preferred before the extended date i.e., 30.06.2002."

20. Now let us summarise our conclusions:-

The claim of the petitioner that the fourth floor was constructed without her knowledge and consent and the same is to be demolished on the ground that the construction was made after the cut off date viz. 28.2.1999, is rejected for the various reasons assigned by us. In the light of clause-1 in the Memorandum of Agreement, dated 21.08.1997, between the petitioner and the third respondent, we hold that the petitioner is exclusively entitled to the area coloured yellow in the plan appended to the said agreement and which is situated on the eastern side of the building constructed in the Schedule 'A' property, for car-parking. In view of the information furnished that the urinals put up had already been removed, there is no need to issue any direction in that regard. Inasmuch as the 5th respondent completed the construction in the fourth floor in 1998 itself before the cut off date viz., 28.02.1999, and also applied for regularisation by remitting a sum of Rs.6,50,000/- even on 31.10.2000 well before the extended date ie., 30.06.2002, the authority concerned / the Monitoring Committee shall consider the case of the 5th respondent in accordance with law and in the light of the guidelines prescribed by the Division Bench. Since the petitioner has grievance in respect of barricades, garden and generator room, she is also permitted to place her objections before the Monitoring Committee with reference to those aspects, whereupon, the Committee shall simultaneously decide her claim while considering the case of the 5th respondent so that a quietus may be given to the dispute between the parties. It is made clear that the Committee shall give adequate opportunity to the parties to place all relevant details in support of their respective claims.

21. Writ petition is disposed of with the above direction. No costs. Connected Miscellaneous Petitions are closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To
1. The Member Secretary, The Chennai Metropolitan
   Development Authority, Thalamuthu Natarajan Maligai,
No.8, Gandhi Irwin Road, Egmore, Chennai-600 008.

2. The Commissioner, Corporation of Chennai,
Rippon Building, Chennai-600 003.

+ 1 CC To Mr.G.T.Subramanian, Advocate SR NO.21738
+ 1 CC To Mr. PR.Raman, Advocate SR NO.21565
+ 1 CC To Mrs.Radha Gopalan, Advocate SR NO.21467
+ 1 CC To Mr. Krishnamachari, Advocate SR NO.21255

Writ Petition No.47736 of 2006

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